IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANT

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INDEX

LIST OF AUTHORITIES CITED:

Cases

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REPLY BRIEF FOR APPELLANT

This brief is submitted in reply to those contentions advanced in the brief of the appellee which were not considered in appellant's main brief. It is unnecessary to reply to Point II of the appellee's brief, since the motion to dismiss the appeal, referred to therein as pending, has been denied.

Appellee's Contention That Appellant's Construction of Section 20a Will Deprive Appellee of Property Without Due Process of Law.

The appellee argues (Appellee's brief, pp. 6, 7) that the construction of Section 20a urged by appellant would deprive the appellee of her property without due process of law. We submit that this suggestion lacks substance.

In fact it can be affirmatively demonstrated from the record that the appellee and other bondholders are not deprived of any substantial rights or remedies which they at any time had by reason of the guaranty of The Lake Erie & Western Railroad Company. The appellee seems to admit (Appellee's brief, p. 6) that ever if appellant's contention be sustained appellee would have a remedy in equity against the assets of The Lake Erie & Western which can be traced into the hands of appellant. *Railroad Company* v. *Howard*, 7 Wall. 392 (1868). Such a remedy is given in equity on the theory that the appellant took the assets of its constituent companies subject to a trust in favor of their creditors. Under this theory the appellee could reach in equity all the assets of The Lake Erie & Western Railroad Company which the holders of the bonds and coupons could have reached if the consolidation had not occurred.

The appellee cites two New York cases[1] (Appellee's brief, p. 7) holding that, following a consolidation, actions upon liabilities of the constituent companies must be

[1] *Cameron* v. *United Traction Co.*, 67 App. Div. 557, 73 N. Y. Supp. 981 (1st Dept., 1902), and *Lee* v. *Stillwater & Mechanicville Street Ry. Co.*, 140 App. Div. 779, 125 N. Y. Supp. 840 (3rd Dept., 1910).

brought against the consolidated company and cannot be brought against the constituents. The ground of decision was that the liabilities of the constituent companies had attached to and become binding upon the consolidated company and the consolidation statute under such circumstances gave an exclusive and adequate remedy against the latter company. These cases were decided prior to the enactment of Section 20a of the Interstate Commerce Act. If, as appellant contends, Section 20a operated to prevent the attachment to the appellant of the guaranty obligation of The Lake Erie & Western Railroad Company, the reasoning of the courts in the above cases would have no application and under such circumstances it is possible that the New York courts would permit actions to be brought against The Lake Erie & Western, which under Section 143 is deemed to continue in existence to preserve creditors' rights. *Gale* v. *Troy & B. R. Co.*, 4 N. Y. Supp. 295 (Gen. Term, 3rd Dept., 1889).

The appellee has, therefore, substantially all the rights and remedies which she would have had in the New York courts if the consolidation had not occurred. She is, in the case at bar, actually claiming rights (under Section 143) which are additional to those contained in the guaranteed bonds held by her. Such additional rights she cannot have, because the state statute under which she claims them is inoperative by reason of its repugnancy to Section 20a. The mere fact that in the interest of the regulation of interstate commerce Congress has limited appellee to her original contractual rights on the guaranty against The Lake Erie & Western Railroad Company and its assets does not deprive her of property without due process of law.

Cases of the Interstate Commerce Commission Relied Upon by Appellee.

In its main brief[2] the appellant has shown that the Interstate Commerce Commission has construed Section 20a as applying to the attachment of obligations with respect to securities to a consolidated corporation upon its consolidation under state law (B. 19-23). The appellee does not dispute the holding of the Commission in any of the cases cited by appellant. She argues, however, that two of the cases cited are distinguishable and that in certain others the Commission has suggested that Section 20a has no application to the attachment of obligations with respect to securities to a consolidated company upon its consolidation pursuant to state law.

The appellee attempts to distinguish the holdings in *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936) and *New York, C. & St. L. R. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937), upon the ground that both related to the assumption of liability under agreements extending the maturity dates of mortgage bonds of constituent companies and that they therefore involved not merely the question of the assumption of the old obligation of constituent companies but also the issuance of "new evidences of debt." The fact is, however, that in each the Commission specifically authorized both the proposed extension and "the proposed assumption of obligation and liability as primary obligor in respect thereof, by The New York, Chicago and St. Louis Railroad Company" (221 I. C. C. 772, 774; see also 217 I. C. C. 598, 600).

[2] Hereinafter referred to as B.

The appellee also argues from these cases that prior to the applications to the Commission the appellant had paid the interest due upon these bonds and that such payments showed that the appellant deemed it unnecessary to obtain the prior authorization of the Commission to any assumption of such obligations. No such inference can be drawn from the mere fact that such interest payments were made by the consolidated company. Upon consolidation, the properties of the constituent companies had vested in the appellant subject to the liens of their mortgage bonds. Unless interest on such mortgage bonds were paid, the properties of the constituent companies might have been lost to the appellant by foreclosure of the mortgages. The payment of interest by appellant under these circumstances was made merely to retain the mortgaged properties and did not constitute the assumption by it of any personal obligation on the mortgage bonds of its constituents.

The appellee also asserts that the Commission, by its language in *Assumption of Obligations by L. S. and I. R. R.*, 86 I. C. C. 640 (1924), and in three other cases,[3] indicated that it "deemed the state statutes fully effective in attaching liability irrespective of the application" (Appellee's brief, p. 9).

In *Assumption of Obligations by L. S. and I. R. R.*, *supra*, and other cases cited in our brief (B. 20) the Com-

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[3] *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924);
Akron, C. & Y. Ry. Co. and *Northern Ohio Ry. Co. Reorganization*, 228 I. C. C. 645 (1938);
New York, Chicago & St. Louis R.R. Bonds, 82 I. C. C. 365 (1924).

mission granted to consolidated companies authority, under Section 20a, to assume the obligations of constituent companies which purportedly attached to the consolidated companies by virtue of state statutes. If the Commission had believed the state statutes to be effective to impose such obligations without its approval, it would, under its usual practice, have denied the applications for lack of jurisdiction.

Thus the Commission has several times dismissed applications by carriers for authority to assume obligations in respect of securities, on the ground that the action of the carrier did not constitute an assumption of obligations in respect of securities for which the approval of the Commission was required to be obtained under Section 20a, and action by the Commission was therefore unnecessary.

Southern Pacific Company Assumption of Obligation, 189 I. C. C. 212 (1932);
Missouri-K-T R. R. Co. Assumption of Obligation, 212 I. C. C. 217 (1936).

In none of the other cases relied on by appellee was the Commission confronted directly with the problem of the liability of a consolidated corporation upon its constituents' obligations in respect of securities. We respectfully submit that the language relied upon by appellee does not clearly indicate any opinion of the Commission as to the question presented on this appeal. In any event, whenever application has been made by a consolidated company for authority to assume its constituents' obligations in respect of securities, the Commission has granted such authority

and has thereby indicated its belief that state statutes were not effective to impose such personal obligations in the absence of such authorization (B. 19-20).

Appellee's Contention that the Interstate Commerce Commission approved the Assumption by Appellant of the Security Obligations Involved in this Appeal.

The appellee finally contends (Appellee's brief, pp. 12, 13) that by authorizing the appellant to operate the lines of its constituents and to issue its own capital stock in exchange for the stock of the constituent companies (*Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581 (1923)), the Commission actually approved the assumption by the appellant of all the security obligations of its constituents. This was the situation presented in that case: At the time the appellant was consolidated the Interstate Commerce Commission had no jurisdiction to pass upon the merits of the consolidation, since Section 5 of the Interstate Commerce Act, giving it such jurisdiction, had not then become effective. *Snyder* v. *New York, Chicago & St. Louis R. R. Co.*, 278 U. S. 578 (1929). It was therefore unnecessary for the appellant to make application to the Commission for its approval of the consolidation It was, however, necessary for the appellant to apply, under Section 1 (18) and (19), for approval of the acquisition and operation by the appellant of the lines of its constituent companies, and for approval under Section 20a of the issuance of the appellant's stock in exchange for that of its constituents. The Commission's authorization under Sec-

tion 20a would also have been necessary if the appellant had assumed the obligations of its constituent companies, but since the consolidation agreement did not provide for such an assumption no authorization was necessary, and the consolidated company merely acquired the properties of the constituent companies, subject to the liens of existing mortgages upon the properties of the constituents and to equitable liens in favor of the general creditors of those companies.

It is clear from *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, supra,* however, and from the Commission's order entered therein that the Commission did not consider whether appellant should be authorized to assume the obligations of its constituent companies, nor in fact authorize such assumption. No application was made in that case for any such authorization and it appears from the terms of Section 20a that an authorization of the assumption of obligations must be specifically requested and specifically granted.

The only question before the Commission upon the application of appellant for authority to issue stock under Section 20a was whether such issuance by the consolidated company was compatible with the public interest and necessary and appropriate for, and consistent with, the performance by the appellant of service to the public as a common carrier. It is not the practice of the Commission to consider questions not specifically raised by an application to it, even though such questions may be within its jurisdiction upon proper application.

The only question before the Commission upon the application of the appellant for a certificate under Section 1 (18), (19), authorizing it to acquire and operate the lines of its constituents, was whether public convenience and necessity required such acquisition and operation. The decisions of the Commission clearly indicate that any assumption of obligations involved in such acquisition or operation must in addition have the specific authority of the Commission granted under Section 20a upon separate application.

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928);

Chicago, M., St. P. & P. R. Co. Acquisition, 158 I. C. C. 770 (1930);

Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127 (1931);

Pacific Coast R. Co. Securities, 189 I. C. C. 79 (1932).

Even where the Commission has approved a consolidation under Section 5 of the Interstate Commerce Act and the issuance or assumption of obligations with respect to securities is incidental to the consummation of the consolidation, separate application under Section 20a must be made for approval of such issuance or assumption by the consolidated carrier.

Rock Island System Consolidation, 193 I. C. C. 395, 403 (1933);

Illinois Term. R. Co. Consolidation and Securities, 221 I. C. C. 676 (1937).

It is thus clear that, in the view of the Commission, questions as to the issuance and assumptions of obligations in respect to securities must receive the separate consideration of the Commission upon separate application; and the contention of the appellee that any approval of the Commission can be inferred from its approval of the acquisition of the lines of the constituents and the issuance of capital stock is untenable.

Respectfully submitted,

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